# National Labor Relations Board Weekly Summary

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## of NLRB Cases

Division of Information Washington, D.C. 20570 Tel. (202) 273-1991

November 9, 2007 W-3129

#### CASES SUMMARIZED VISIT <u>WWW.NLRB.GOV</u> FULL TEXT

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Press Release (R-2648): Gaye Nell Hymon is Appointed Deputy Regional Attorney in NLRB's Atlanta, GA Regional Office

\*This summary should have appeared in the Weekly Summary (W-3125) dated October 12 2007.

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Albertson's, Inc. (27-CA-13390 et al.; 351 NLRB No. 21) Boise, ID Sept. 29, 2007. The Respondent is a major retail grocery chain with numerous retail stores, warehouses, and distribution facilities located throughout the country. Several unions represent employees in separate bargaining units at facilities located in the Respondent's Western Region and Rocky Mountain Division. A large portion of this consolidated case arose out of complaint allegations regarding the obligations of the Respondent to respond to information requests made by these unions over the course of several months between 1994 and 1998. The administrative law judge found that the Respondent unlawfully refused or otherwise failed timely to provide requested information to the unions on numerous occasions, unlawfully engaged in direct dealing with employees and bypassed their designated bargaining representative, unlawfully disciplined employees for their union or protected concerted activity, and unlawfully maintained an overly broad badges and pins rule for employees. [HTML] [PDF]

The Board adopted most of the judge's findings of separate violations of Sections 8(a)(1), (3), and (5) of the Act. It also agreed with the judge's dismissals of several independent 8(a)(1) violations based on statements by certain Respondent officials. However, the Board disagreed with the judge on the following complaint allegations and the overall remedy to be imposed in this case.

The judge found that the Respondent violated Section 8(a)(1) by maintaining rules that subjected employees to immediate discharge for engaging in certain activity including the following: (1) disclosure of confidential information, (2) participation in activity described as "off-the-job conduct," and (3) involvement in activity described as "other misconduct." These rules are part of the company personnel policies and retail store employee handbook. The confidentiality rule punishes employees "for [d]isclosing confidential information or any other similar act constituting disregard for the Company's best interest." The off-the-job-conduct rule prohibits employees from engaging in "[o]ff-the-job conduct which has a negative effect on the Company's reputation or operation or employee morale or productivity." The other misconduct rule prohibits employees from engaging in "[a]ny other misconduct which, in the Company's judgment, warrants immediate discharge."

The Board unanimously agreed that the Respondent unlawfully maintained the above confidentiality rule. It found that the record contained sufficient evidence showing that the Respondent notified employees that it had applied the confidentiality rule to restrict an employee's exercise of her Section 7 rights. This context provided a factual basis for the employees reasonably to view the rule as prohibiting Section 7 rights. The Board therefore found that the maintenance of the confidentiality rule would reasonably tend to chill employees in the exercise of their Section 7 rights.

However, Chairman Battista and Member Schaumber did not adopt the judge's findings of violations regarding the other two rules. They observed that the challenged off-the-job-conduct and other misconduct rules were sufficiently close to comparable rules found lawful in *Lafayette Park Hotel*, 326 NLRB 824, 826-827 (1998), *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 (1999), and *Ark Las Vegas Restaurant Corp.*, 335 NLRB 1284, 1291 (2001). Applying the principles of *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004), the Board majority found that neither rule expressly covered Section 7 activity, nor was there any evidence

that the Respondent had applied either rule to protected activity or that the Respondent adopted either rule in response to protected activity. They also found that neither rule could reasonably be read by employees as encompassing Section 7 activity, and accordingly dismissed these allegations. Member Walsh dissented from his colleagues' dismissal of these allegations because, inter alia, he agreed with the judge's analysis and with the views expressed by Members Fox and Liebman in their partial dissent in *Lafayette Park Hotel*, supra at 832.

The complaint also alleged that the Respondent's maintenance of certain nationwide no-solicitation rules applicable to its 435 retail stores located in California was unlawful. These rules, which appear in the Respondent's company personnel policies and its retail store employee handbook, proscribe nonemployee solicitations and distributions of literature or information on the Respondent's premises at all times. The rules were not initiated in response to any union or protected concerted activity, and there was no evidence that the Respondent disciplined any employee (or took action against any nonemployee) under these rules for engaging in union or protected concerted activity on company premises in the State of California or elsewhere. The judge found that these no-solicitation rules constituted overly broad restrictions on union and protected activity in violation of Section 8(a)(1).

Chairman Battista and Member Schaumber reversed the judge and found that the General Counsel had failed to satisfy his burden of proof. Under extant precedent, the Board looks to State law to ascertain whether an employer has a property right sufficient to deny access to nonemployee union representatives. California constitutional law limits a private property owner's right to exclude persons seeking access for purposes of exercising their free speech rights "if the property is freely and openly accessible to the public" which includes places that are the functional equivalent of a public forum. In this case, the General Counsel failed to show that the Respondent's California stores constituted public forums, which would trigger an application of the California constitutional provision. In the absence of such proof, the Board majority found that the Respondent's restriction on nonemployees' activity on its premises did not violate Section 8(a)(1) of the Act, citing *George L. Mee Memorial Hospital*, 348 NLRB No. 15, slip op. at 5 (2006). In view of his partial dissent in *George L. Mee Memorial Hospital*, supra, slip op. at 15, Member Walsh dissented from his colleague's dismissal of this allegation. He would find that the no-solicitations rules at issue constitute an overbroad restriction of Section 7 rights and therefore were unlawful.

The judge's recommended Order included broad injunctive language, enjoining the Respondent from "in any other manner" violating the Section 7 rights of employees, based on the Respondent's failure to adequately and/or timely respond to information requests involving stores in the Respondent's Rocky Mountain Division. The judge also recommended special remedies that impose a series of extraordinary and specific conduct requirements on the Respondent in order for it to meet its statutory obligations to furnish requested information relating to its Rocky Mountain Division facilities. Contrary to the judge, Chairman Battista and Member Schaumber found that the Respondent's misconduct does not meet the stringent standard for a broad order under *Hickmott Foods*, *Inc.*, 242 NLRB 1357 (1979). For this reason, they considered a narrow cease-and-desist order as the appropriate remedy in this case. They

also found that the special remedies directed by the judge were unwarranted and went beyond what is needed to fully rectify the unfair labor practices. In this connection, they observed that there had been no showing that the Board's traditional remedies will not sufficiently ameliorate the effect of the information request violations committed by the Respondent. Accordingly, the Board majority substantially modified the remedy to be imposed in this case. Member Walsh disagreed with his colleagues. Like the judge, he believed that the circumstances of this case warranted the imposition of a broad cease-and-desist order against the Respondent's Rocky Mountain Division stores and the special remedies concerning the Respondent's obligation to comply with future information requests.

(Chairman Battista and Members Schaumber and Walsh participated)

Charges filed by several affiliated local unions of Food and Commercial Workers, Teamsters Local 537, Bakery Workers Local 119, and Stuart Fishman, an individual; complaint alleged violations of Section 8(a)(1), (3), and (5). Hearing at Denver, CO, San Francisco, CA, and Portland, OR between Oct. 1998 and May 2001. Adm. Law Judge Clifford H. Anderson issued his decision July 3, 2002.

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Paramus Ford, Inc. (22-CA-27444; 351 NLRB No. 53) Paramus, NJ Oct. 31, 2007. The Board adopted the administrative law judge's finding that Paramus Ford, Inc. is the successor employer to Pistilli Ford, Inc., and therefore violated Section 8(a)(1) and (5) of the Act by failing to recognize and bargain with the Union in a unit of service and parts department employees. Because the judge found that Paramus Ford's duty to bargain was triggered when (a) the Union made an effective demand for recognition and bargaining and (b) a substantial and representative complement was in place, on Feb. 13, 2006, the Board modified the judge's second conclusion of law and recommended Order to reflect that date. [HTML] [PDF]

In finding that the Union made a demand for recognition and bargaining on Feb. 2, 2006, Chairman Battista and Member Schaumber relied only on the letter that the Union sent to the Ford Motor Company on that date. Member Liebman would affirm the judge's finding that a substantial and representative complement of employees was in place on Feb. 13, 2006, but, consistent with her dissent in *Elmhurst Care Center*, 345 NLRB No. 98, slip op. at 5 (2005), questioned the continued viability of the "normal operations" test in unfair labor practice cases, given the Board's abandonment of that test in representation cases.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Service Workers Local 355, IUJAT; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Newark on Oct. 31, 2006. Adm. Law Judge Steven Davis issued his decision Jan. 31, 2007.

#### LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

North American Linen, LLC (United Workers of America Local 621) Long Branch, NJ Oct. 29, 2007. 22-CA-27783; JD(ATL)-33-07, Judge Lawrence W. Cullen.

UZI Einy, New York, NY Oct. 26, 2007. 2-AD-59; JD-69-07, Judge Richard A. Scully.

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### LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

(In the following cases, the Board considered exceptions to Reports of Regional Directors or Hearing Officers)

#### DECISION AND CERTIFICATION OF REPRESENTATIVE

C. Martin Co., Inc., Las Cruces, NM, 28-RC-6525, Oct. 31, 2007 (Chairman Battista and Members Liebman and Schaumber)

## **DECISION AND DIRECTION**[that Regional Director open and count ballots]

Western Waterproofing Co., Livonia, MI, 7-RC-23011, Oct. 31, 2007 (Chairman Battista and Members Liebman and Kirsanow)

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(In the following cases, the Board adopted Reports of Regional Directors or Hearing Officers in the absence of exceptions)

## **DECISION AND DIRECTION**[that Regional Director open and count ballots]

Potts Construction, Inc., Oneida, WI, 30-RC-6660, Nov. 1, 2007 (Members Liebman, Schaumber, and Kirsanow)

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# (In the following cases, the Board granted requests for review of Decisions and Directions of Elections (D&DE) and Decisions and Orders (D&O) of Regional Directors)

Lancaster Symphony Orchestra, Lancaster, PA, 4-RC-21311, Oct. 31, 2007 (Chairman Battista and Members Schaumber and Walsh)

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# (In the following cases, the Board denied requests for review of Decisions and Directions of Elections (D&DE) and Decisions and Orders (D&O) of Regional Directors)

Edw. C. Levy Co., East Chicago, IN, 13-RD-2522, Oct. 31, 2007
(Chairman Battista and Members Schaumber and Walsh)

Levy Indiana Slag Co., Gary, IN, 13-RD-2520, Oct. 31, 2007
(Chairman Battista and Members Schaumber and Walsh)

Maggies Paratransit Corp., Brooklyn, NY, 29-RC-11443, Oct. 31, 2007
(Chairman Battista and Members Schaumber and Walsh)

SPE Utility Contractors, LLC, Port Huron, MI, 7-RD-3583, Oct. 31, 2007
(Chairman Battista and Members Schaumber and Walsh)

Wake Electric Membership Corp., Wakeforest, NC, 11-RC-6678, Oct. 31, 2007
(Chairman Battista and Members Schaumber and Walsh)

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#### Miscellaneous Board Decisions and Orders

ORDER [granting Employer Petitioner's request to withdraw its request for review]

Chemtura Corp., Morgantown, WV, 6-UC-481, Nov. 2, 2007

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